

Running head: JUDICIAL DOWNWARD DEPARTURES FOR CHILD PORNOGRAPHY

“Fundamentally flawed?” Exploring the use of policy disagreements in judicial downward  
departures for child pornography sentences

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# JUDICIAL DOWNWARD DEPARTURES FOR CHILD PORNOGRAPHY

## *Abstract*

### *Research Summary*

*Using U.S. Sentencing Commission data, this study assesses whether judicial downward departures are more prevalent among child pornography offenders compared with a matched sample of defendants convicted of other offenses. Additionally, we examine reasons given by judges when departing from the guidelines for these offenders. We found that child pornography defendants received significant reductions in sentences by way of judicial downward departures.*

### *Policy Implications*

*In 2007, the Supreme Court considerably altered the federal sentencing process. In *Kimbrough v. United States* (2007), the Court held that judicial departures were permissible on grounds of a policy disagreement. Many circuit courts have authorized sentencing judges to depart from the guidelines in child pornography cases based on such a policy disagreement. The findings of this study suggest that judicial downward departures for these offenders cannot be explained by individual characteristics, such as race, gender, or age, and may be indicative of a specific disagreement with this particular sentencing policy. An examination of the reasons provided by judges supports the hypothesis that judges may be attempting to remedy what they perceive as unjustly harsh sentencing guidelines.*

## JUDICIAL DOWNWARD DEPARTURES FOR CHILD PORNOGRAPHY

### “Fundamentally Flawed”? Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences

In 1984, Congress enacted the Sentencing Reform Act, which created the U.S. Sentencing Commission (USSC) and authorized the Commission to develop and implement presumptive sentencing guidelines designed to achieve “honesty,” “uniformity,” and “proportionality” in sentencing. The Act also abolished discretionary release on parole, stated that departures from the guidelines would be permitted with written justification, and provided for appellate review of sentences to determine whether the guidelines were correctly applied or a departure was reasonable.

Restructuring the federal sentencing process has not been without its challenges and limitations, and a recent U.S. Supreme Court decision significantly altered the process by requiring the guidelines to function in an advisory role (*United States v. Booker*, 2005). Concomitantly, Congress has imposed directives that, some contend, abandon the true objectives of the guidelines and may instead exploit public fear to inform sentencing policy (Basbaum, 2010; *Kimbrough v. United States*, 2007). Critics also contend that congressionally enacted policies have led to controversial sentencing practices such as the crack- and powder-cocaine disparity (Kautt and Spohn, 2002). This led the Supreme Court to rule, in *Kimbrough v. United States* (2007), that sentencing judges are free to disregard these sentencing guidelines if they believe that their application results in sentences for crack cocaine offenses that are unreasonably severe. Three years later, the U.S. Court of Appeals for the Second Circuit applied the reasoning established in *Kimbrough* to the child pornography guidelines (*United States v. Dorvee*, 2010). The court noted that these guidelines require sentence enhancements for most offenders and thus result in “unwarranted similarities among sentences for defendants who have been found guilty

of dissimilar conduct” (p. 187). The court further stated that this inherent inconsistency with the principles underlying the sentencing guidelines meant that “a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses” (p. 188). This decision has been followed by many other circuit court opinions reiterating this position.<sup>1</sup>

The purpose of this article is to determine how often judges use their discretion to depart from sentencing guidelines for child pornography offenses and to identify the reasons for judicial downward departures in these cases. This article will be the one of the first to review departures in child pornography cases empirically (see also Hamilton, 2014), which are a newer group of offenses to have their guideline usefulness and appropriateness debated. Analyses will control for individual- and case-level characteristics potentially associated with downward departures to determine whether downward departures are more likely in child pornography cases than in cases involving sexual abuse and other types of offenses.

## **Federal Sentencing of Child Pornography Offenders**

Before the advent of the Internet, finding and obtaining images of child pornography required either going into a back room of a seedy adult store or using a mail order business, which increased the risk of detection. The production of child sexual abuse images was difficult and expensive (U.S. Department of Justice, n.d). This all changed once these images went digital. The Internet provided an easy place for individuals to create, retrieve, and spread images of child

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<sup>1</sup> *United States v. Huffstatler* (7th Cir., 2009); *United States v. Dorvee* (2nd Cir., 2010); *United States v. Grober* (3rd Cir., 2010); *United States v. Pape* (7th Cir., 2010); *United States v. Henderson* (9th Cir., 2011); *United States v. Garthus* (7th Cir., 2011); *United States v. Halliday* (7th Cir., 2012).

pornography worldwide with nearly complete anonymity. Ever since, law enforcement has been fighting an uphill battle to detect and eradicate this crime (Jenkins, 2001).

Along with law enforcement efforts, legislative responses have become more severe as the prevalence of child pornography has increased. Over the past 30 years, Congress has increasingly focused on expanding the scope of child pornography laws and the severity of penalties (for an overview of the history of child pornography legislation, see U.S. Sentencing Commission, 2009). The two general types of child pornography offenses are (a) the production of child pornography and (b) nonproduction offenses such as the possession, distribution, and receipt of these images.<sup>2</sup> Under the federal sentencing guidelines, the recommended sentence for child pornography offenders has, in some cases, increased sevenfold over the past two decades (Hamilton, 2011).

Congress has played a significant role in creating and amending child pornography sentencing guidelines, substantively revising the guidelines nine times (U.S. Sentencing Commission, 2009). The base-level offense severity score for nonproduction child pornography offenses has increased from 13 for possession and 15 for the receipt, transportation, and distribution of images in 1992, to 18 and 22, respectively, in 2012 (U.S. Sentencing Commission, 2012). Using the base-level guidelines, the minimum sentence for a defendant convicted of possession of child pornography who had a minimal or no criminal history would have been 18 months in 1992, but it was 41 months in 2012. This represents an increase of more than 70% in the guideline minimum (U.S. Sentencing Commission, 2012).

Beyond the increase in the base-level guidelines, Congress also has enacted sentence enhancements that apply to child pornography offenders (Basbaum, 2010; Hamilton, 2011;

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<sup>2</sup> Nonproduction of child pornography offenses are defined under 18 U.S.C. § 2252 and 18 U.S.C. § 2252A. Production of child pornography is defined under 18 U.S.C. § 2251 and § 2260.

Hessick, 2011; U.S. Sentencing Commission, 2009, 2012; *United States v. Dorvee*, 2010). The application of enhancements results from such things as the use of a computer, the number of images possessed, and sharing of images. Use of the Internet to distribute and share child pornography means that these enhancements, which were designed to be used as aggravating factors in determining sentences for offenders convicted of more severe forms of offending, might apply to a significant percentage of child pornography cases (Basbaum, 2010; Hamilton, 2011; U.S. Sentencing Commission, 2012). Their application also results in very punitive sentences. As Hamilton (2011) pointed out, federal sentences imposed for nonproduction child pornography are more severe than those for manslaughter, drug importation, and sexual abuse offenses. As will be explored subsequently, whereas some commentators have argued that these sentencing increases are disproportionately high compared with the seriousness of the offense, others have suggested that the substantial harm associated with child pornography crimes demands harsh penalties for these offenders.

### **Actual Risk or Moral Panic?**

Concern regarding the dangers posed by sex offenders has existed for decades (Jenkins, 1998). Scholars have suggested that many sex offender laws, including sex offender registration, community notification, and sentencing statutes, were the result of a “moral panic” about the dangers that these individuals pose to victims, especially children (Gavin, 2005; Hinds and Daly, 2001; Jenkins, 1998; Quinn, Forsyth, and Mullen-Quinn, 2004; Sample, 2006, 2011; Sample and Kadleck, 2008; Steinbock, 1995; Zgoba, 2004). According to Sample (2006), this moral panic reflects public fear resulting from a few isolated incidents of sexually related child homicides. The outcome is a demand from the public for quick legislative action. Critics contend that

extensive media coverage of these events promoted exaggerated perceptions of an epidemical problem (Ben-Yehuda, 1990; Cohen, 2002; Sutherland, 1950).

The scholarly discourse about the specific influence of moral panic on child pornography legislation in particular is limited. Some scholars have concluded that the amount of child pornography on the Internet is so pervasive as to warrant even greater public concern (Jenkins, 2001). The extent of child pornography available online, however, is unknown and accurate assessments are difficult to obtain (Howitt and Sheldon, 2007). Nevertheless, as Jenkins (2001) contended, the possibility that even a small amount of child pornography is readily available online is a problem that warrants concern. Those who apply the term “moral panic” to child pornography legislation do not deny that the problem exists (Cohen, 2002; Jenkins, 2001); rather, they contend that its significance is exaggerated or distorted to the point that it leads to reaction-based policies that are constructed out of fear and that might be ineffective. In actuality, the effectiveness of these policies is unknown.

Child pornography legislation has increasingly focused on prosecuting and punishing those who possess or share images (U.S. Sentencing Commission, 2009). Law enforcement has engaged in sting operations and undercover strategies that troll online file-sharing websites to find individuals who collect or share images of child pornography (U.S. Sentencing Commission, 2012). Given the dramatic discrepancy between the number of convictions for possession of child pornography and convictions for production offenses, it seems that little investigative attention focuses on those who produce child pornography.<sup>3</sup> One argument for this strategy is the classic economic perspective of supply and demand; that is, concentrating efforts on decreasing the demand for these images will in effect reduce the number of images being

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<sup>3</sup> In 2010, 1,717 offenders were convicted of nonproduction offenses compared with 207 who were convicted of production offenses (U.S. Sentencing Commission, 2012: ii n. 5).

created (Jenkins, 2001). This rationalization, however, has not been tested or proved. No studies to date have assessed whether the continued effort to reduce demand has had any impact on the production of child pornography.

Hessick (2011) identified and critiqued reasons given by those in favor of sentencing offenders convicted of nonproduction child pornography offenses as severely as, or even more severely than, offenders convicted of sexually abusing children. According to Hessick (2011: 855), support for severe sentences for those who possess or distribute child pornography is “tied to a perception that those who possess child pornography are indistinguishable from those who actually abuse children.” As Hessick noted, this notion is expressed in various forms; however, those who make this argument assume that offenders who view child pornography images on a computer either have already abused a child in the past, currently want to abuse a child, or will abuse a child in the future. This assumption has been called into question by recent research (i.e., Basbaum, 2010; Bourke and Hernandez, 2009; Buschman, Wilcox, Krapohl, Oelrich, and Hackett, 2010; Seto and Eke, 2005). One meta-analysis, for example, compared online and offline sexual offenders and found that there were statistically significant differences between the two groups of offenders (Babchishin, Hanson, and Hermann, 2011). The authors found that online offenders had greater victim empathy but expressed greater sexual deviancy than offenders who did not access child pornography online. In addition, a meta-analysis of studies that reviewed the prevalence of physical sexual abuse of children by child pornography offenders found there might be a subgroup of online offenders who pose a relatively low risk of committing physical sexual abuse against children (Seto, Hanson, and Babchishin, 2011).

According to Hessick (2011), another reason cited to justify the severity of sentences for nonproduction child pornography offenses is that the images are equivalent to, or possibly even



worse than, the actual sexual abuse of the child. The assumption is that victims of child sexual abuse are more harmed by the sharing and availability of the images depicting their abuse than by the actual abuse itself. Those who advocate severe punishment also argue that harsh sentences have a preventative effect—that is, to prevent those who view child pornography from physically abusing children in the future, the punishment for nonproduction child pornography offenses must be severe (Hessick, 2011). This argument relies on the belief that possession or viewing of child pornography will increase an individual's risk for future physical victimization of a child. Research that has been conducted to test this hypothesis, however, has not found support for such a relationship (Seto et al., 2011).

In summary, there is a lack of empirical evidence to support many of the claims for increased severity of punishment for nonproduction child pornography offenses. This finding is problematic, as the U.S. sentencing guidelines are supposed to be based on empirical evidence to establish reasonable and rational sentences (U.S. Sentencing Commission, n.d.). This lack of an empirical foundation for child pornography sentencing guidelines has been part of the basis of many circuit court opinions authorizing sentencing judges to disregard these guidelines altogether.

### **Sentencing Guidelines and Judicial Policy Disagreements**

Critics of the indeterminate sentencing systems that were common prior to the advent of sentencing guidelines charged that judicial discretion produced unwarranted disparity in sentencing outcomes (Tonry, 1996). To combat this disparity, there was overwhelming support for reform of the sentencing system (Frankel, 1972). In 1984, under the Sentencing Reform Act, Congress established the USSC to create a sentencing system with the principal goal of

decreasing unwarranted disparity in the federal sentencing process by the strict structuring of judicial discretion (Nagel and Schulhofer, 1992). Congress ordered the Commission to develop guidelines that incorporate the purposes of punishment, provide certainty and fairness, and “reflect, to the extent practicable, the advancement in knowledge of human behavior as it relates to the criminal justice process” (28 U.S.C. § 991(b)(1)(c)). Although a substantial body of research assessed the influence of sentencing policy on reducing unwarranted disparity among similarly situated defendants (for examples, see Albonetti, 1997; Griffin and Wooldredge, 2006; Koons-Witt, 2002; Kramer and Ulmer, 1996; Spohn, 2000; Stolzenberg and D’Alessio, 1994; Ulmer, Light, and Kramer, 2011a, 2011b; Wang, Mears, Spohn, and Dario, 2013; Wooldredge and Griffin, 2005; Zatz, 2000), most scholars have not considered the possibility of unwarranted similarity in the sentences imposed on defendants convicted of dissimilar conduct.

As Congress has continued to restrict federal judicial discretion, the legal system has been pushing back through court rulings designed to restore some level of judicial autonomy (Ulmer et al., 2011a). For example, Congress sought to limit judicial discretion by enacting the PROTECT Act of 2003, which attempted to eliminate all unenumerated downward departures for all offenses and ultimately did so for child pornography and child sex abuse offenses (U.S. Sentencing Commission, 2009). Two years later, the Supreme Court ruled that the guidelines are “effectively advisory” (*United States v. Booker*, 2005: 245) and clarified that appellate judges could uphold sentences determined to be reasonable, regardless of whether the sentences fell inside or outside the guideline range (*Rita v. United States*, 2007). In *Gall v. United States* (2007), the Court further held that district judges must make individualized assessments based on the facts of the case presented and need not automatically assume that the guideline range is reasonable.

As a result of these court decisions, federal district judges have more latitude to depart from the sentencing guidelines based on individualized assessments of offenders and their crimes. Following *Booker*, judges were allowed to depart from the sentencing guidelines based on individual case circumstances. In *Kimbrough v. United States* (2007), the Supreme Court expanded this, holding that district judges could use departures not only for individualized reasons specific to an offender or a case but also based on the judge's categorical disagreement with a specific sentencing guideline policy (Michelman and Rorty, 2012). This opinion specifically addressed policy disagreement with the disparate sentences required for offenders convicted of offenses involving crack and powder cocaine, but several appellate courts have applied this reasoning to child pornography offenses (U.S. Sentencing Commission, 2012). As a result, the use of downward departures in these types of cases has increased. For example, in 2011, 44.9% of child pornography offenders received non-government-sponsored downward departures. By contrast, the national average for non-government-sponsored downward departures for all federal offenses for that same year was 17.4% (U.S. Sentencing Commission, 2011).<sup>4</sup> Although other appellate courts have concluded that policy disagreement arguments cannot be used to justify downward departures in child pornography cases, there is little doubt that offenders in these cases are regularly being sentenced below the guideline range. This phenomenon is confirmed by a recent study conducted by Hamilton (2014), which found that a child pornography offender was more likely to receive a downward departure if the sentencing judge listed a concern about the general adequacy of the guideline. These results offer a clear

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<sup>4</sup> District court cases that have authorized this use of policy disagreement judicial departure include *United States v. Huffstatler*, 2009; *United States v. Stone*, 2009; *United States v. Dorvee*, 2010; *United States v. Grober*, 2010; *United States v. Pape*, 2010; *United States v. Henderson*, 2011; and *United States v. Garthus*, 2011. Courts that have rejected this application include *United States v. Pugh*, 2008; *United States v. Miller*, 2011; *United States v. Mohr*, 2011; *United States v. Bistline*, 2012; *United States v. Black*, 2012; and *United States v. Strieper*, 2012.

indication that policy disagreements may play a significant role in the sentencing of child pornography offenders. This current study will build on and extend these results by Hamilton by providing a robust comparison of child pornography cases with another set of cases in which policy disagreements have not been raised. Additionally, by providing a qualitative review of departure reasons, we hope to demonstrate the role of policy disagreements in federal sentencing decisions. As we argue next, the focal concerns perspective may help to explain the prevalence of downward departures for child pornography offenders.

### **Theoretical Perspective on Downward Departures in Child Pornography Cases**

According to the focal concerns perspective, judicial decision making is based on an assessment of the offender's blameworthiness, a desire to protect the community from dangerous offenders, and concerns about the practical constraints on and consequences of sentencing decisions (Steffensmeier, Ulmer, and Kramer, 1998). Focal concerns theorists argue that judges have limited case information (Albonetti, 1991) and, therefore, develop a "perceptual shorthand" based on stereotypes linked to an array of offender characteristics, including race/ethnicity, gender, social class, and other social positions (Engen, Gainey, Crutchfield, and Weis, 2003: 110; Kramer and Ulmer, 2002: 904; Steffensmeier and Demuth, 2000: 709; Steffensmeier et al., 1998: 768; Ulmer and Johnson, 2004: 145). These offender characteristics (along with offense type and prior record) influence sentencing outcomes because images or attributions connect them to groups thought to be bad (or good) risks for rehabilitation, potentially dangerous (or not), and more (or less) culpable (Bridges and Steen, 1998; Hawkins, 1981; Steffensmeier and Demuth, 2000: 709). This assessment means that judges look beyond the current offense to consider offenders' past behavior, personal background, and current circumstances; this allows

them to make distinctions among defendants who seem similar to one another based only on the convicted offense (Wheeler, Mann, and Sarat, 1988).

As noted, one of the primary critiques of the current child pornography sentencing scheme is that it fails to distinguish between variations of severity, both within child pornography offenses as well as compared with other offenses (Basbaum, 2010; Hamilton, 2011; Hessick, 2011; U.S. Sentencing Commission, 2009, 2012). Given the lack of adaptability within the child pornography sentencing structure, it is possible that judges will be more likely to use downward departures to mitigate what they perceive as disproportionately severe sentences. In the tradition of the focal concerns perspective, judges could conclude that child pornography offenders do not pose a danger to the community to the extent that the guideline sentence would warrant. Additionally, downward departures may be used for offenders who are labeled as *salvageable* or *sympathetic* (Nagel and Schulhofer, 1992). For example, evidence shows that downward departures for providing substantial assistance in the prosecution and conviction of other offenders are used more frequently for female offenders (Albonetti, 2002; Mustard, 2001; Stacey and Spohn, 2006) and that the likelihood of receiving a substantial assistance departure is affected by the offender's race/ethnicity, age, education, citizenship status, and other personal characteristics (Cano and Spohn, 2012; Hartley, Maddan, and Spohn, 2007; Johnson, Ulmer, and Kramer, 2008; Mustard, 2001; Spohn and Fornango, 2009; Steffensmeier and Demuth, 2000). As Spohn and Fornango (2009: 836–837) noted, although it is possible that women, younger offenders, and offenders with some college are more likely than men, older offenders, and those without a high-school degree to have information to trade and to be willing to trade the information they had for a lighter sentence, a more plausible explanation “is that prosecutors

used the motion for substantial assistance to mitigate the sentences of sympathetic offenders, regardless of whether these offenders had information they were willing to trade.”

Studies have demonstrated that the characteristics of child pornography offenders are substantially different than those of most other types of offenders (U.S. Sentencing Commission, 2012). For example, whereas the typical child pornography offender is an older White male (Wolak, Finkelhor, and Mitchell, 2011; Webb, Craissati, and Keen, 2007), most drug offenders are young minority males (Kautt and Spohn, 2002; Spohn, 2000). Additionally, most child pornography offenders are employed full time (Wolak et al., 2011). Given the unique nature of these types of offenders, it could be argued that child pornography offenders receive preferential judicial treatment based on their age, race/ethnicity, and other personal characteristics. This study will assess this possibility by controlling for known offender and case characteristics traditionally used in federal sentencing research to determine whether child pornography offenders are more likely to receive judicial downward departures compared with similarly situated offenders convicted of other offenses.

### **Current Focus**

The purpose of this article is to determine whether sentencing judges use downward departures more frequently in child pornography cases than in cases involving offenders convicted of sexual abuse and other offenses. We also attempt to determine whether the magnitude of the sentence discount is larger in child pornography cases than in these other types of cases. Furthermore, we review the reasons given by sentencing judges for the use of downward departures in child pornography cases in an attempt to provide an initial assessment of whether the use of departures

in these case represents a categorical “policy disagreement” with the sentencing guidelines for this group of offenses.

## **Data and Methods**

### ***Data***

Data for this study were obtained from the USSC’s Standardized Research Files, which are publicly available and are the same data used by the USSC for its reports. For the purpose of this study, data from fiscal years 2010 and 2011 (October 1, 2009 to September 30, 2011) were combined to provide a sufficiently large number of cases for analysis.<sup>5</sup> The years chosen for this study correspond with recent circuit court rulings that authorized the use of policy disagreement arguments in child pornography sentencing in 2010. The unit of analysis is each sentenced offender. For the first set of analyses, the data were limited to cases categorized as sexual abuse or child pornography.<sup>6</sup> Doing so allows us to compare offenders convicted of two types of sex-based offenses.<sup>7</sup> We compare outcomes for offenders convicted of sexual abuse with those for offenders convicted of child pornography because both federal judges and legal scholars have specifically cited (and criticized) the harshness in federal sentencing for child pornography offenders compared with the more lenient penalties imposed on those convicted of the arguably

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<sup>5</sup> These two data sets were compared to determine whether they could be combined for analysis; we found no statistical differences between the 2 years on the relevant variables of interest.

<sup>6</sup> Sexual abuse offenses will be used as a comparison group in a subset of analyses.

<sup>7</sup> It is necessary to note that sexual abuse offenses are generally not considered federal crimes and those that are prosecuted federally typically come from Native American reservations, which fall under federal jurisdiction for prosecution of serious offenses, or cases that were otherwise perpetrated on federal land. Most sexual abuse cases are prosecuted at the state level. The sexual abuse category includes both adult and child sexual abuse to provide a sufficient number of cases for analysis. Cases of obscenity were not included in this category. Analyses conducted using a Tobit model of the dependent variable using a comparison of “sexual abuse of a minor” cases with “nonproduction child pornography” cases did not produce results significantly different from those presented in this article. Specifically, this model produced an effect size of 2.45 (standard error = 0.47) in the final Tobit model.

more severe offense of sexual abuse (i.e., Hamilton, 2011; Hessick, 2011; U.S. Sentencing Commission, 2009; *United States v. Dorvee*, 2010).

The USSC data categorize all child pornography offenses into one offense group, which includes both (a) offenses related to possession, receipt, transportation, and distribution of child pornography images (hereinafter *nonproduction offenses*), as well as (b) cases involving the actual use of children in the production of child pornography in a single category. Production of child pornography, however, is considered a more serious offense than nonproduction offenses, and offenders convicted of these offenses receive significantly more severe sentences and are less likely to receive departures.<sup>8</sup> These differences, coupled with the fact that circuit courts have allowed downward departures based on policy disagreement only for cases involving nonproduction of child pornography images, prompted our decision to exclude production cases from subsequent analyses. All offenders who were sentenced for offenses such as the receipt, transportation, and distribution of child pornography were grouped into one category. These offenders were sentenced under Title 18, sections 2252 or 2252A, of the U.S. Code for Crimes and Criminal Procedure, which applies to offenses involving child pornography images in which offenders had no actual physical contact with minors. The cases that were excluded involved offenders who were sentenced under Title 18, sections 2251 or 2260, of the U.S. Code for Crimes and Criminal Procedure, in which actual physical abuse of minors was involved in making or attempting to make child pornography images.<sup>9</sup>

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<sup>8</sup> Data analyses of the fiscal 2010–2011 data sets indicate that the mean sentence for offenders convicted of producing child pornography was 244.44 months, compared with 93.80 months for those convicted of nonproduction offenses. Moreover, 46.35% of offenders convicted of nonproduction offenses, but only 21.20% of those convicted of production offenses, received a judicial downward departure.

<sup>9</sup> For cases that had multiple offenses, the most severe offense was used as is consistent with USSC methods.



The descriptive statistics for the independent and dependent variables are presented in Table 1. This table shows individual, case, and guideline variables for sexual abuse and nonproduction child pornography offenders.

(Insert table 1 about here)

### ***Dependent and Independent Variables and the Analytic Approach***

The outcome of interest for this study is whether an offender received a judicial downward departure and as a result was sentenced below the guideline range. Following the approach advocated by Johnson and Kurlychek (2012; see also Bushway and Piehl, 2007), our dependent variable encompasses both the likelihood of a judicial downward departure and the magnitude of the sentence discount for receiving this type of departure, which is measured by the number of months between the guideline minimum sentence for that offense and an offender's actual sentence received.<sup>10</sup> We analyze this variable using Tobit regression (Tobin, 1958), which Johnson and Kurlychek (2012) argued more accurately models the departure decision as it accounts for the dependency between the outcomes measured by using a latent variable that incorporates both the likelihood of a departure and its magnitude. This approach is similar to the method used in research on incarceration decisions under sentencing guideline systems (Bushway and Piehl, 2007; Kurlychek and Johnson, 2010).

The analyses for this study proceed in three stages. We first model our dependent variable using Tobit regression analysis and the full population of nonproduction child

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<sup>10</sup> To create this variable, the likelihood of receiving a downward departure was coded as a dichotomous variable (1 = received departure, 0 = did not receive departure). The magnitude of the departure was then calculated by subtracting the defendants' final sentence from the proposed guideline sentence (capped at 470 months). These two variables were combined to create a latent variable that includes both offenders who did not receive a downward departure (coded as 0) and the sentence discount (in months) for all offenders who received a judicial downward departure.

pornography offenders and offenders convicted of all sexual abuse offenses. The primary independent variable is therefore a dichotomous variable that is coded 1 if the offender were convicted of a nonproduction child pornography offense and is coded 0 if the offender were convicted of sexual abuse. The independent variables used as controls in this model include the offender's age and a dichotomous variable for the offender's gender (male = 1, female = 0). Additionally, offender race/ethnicity was measured using three dichotomous variables (Black, Hispanic, and American Indian/Alaskan Native), with White as the reference group.<sup>11</sup> The offender's education was captured using two dichotomous variables (no high-school diploma and any college), with offenders who received a high-school diploma but had not been to college as the reference group. We also include the offender's criminal history score (which ranges from 1 to 6), offense severity score (which ranges from 1 to 43), and the number of counts of conviction. Other controls include whether an offender was detained (1 = yes, 0 = no), was a U.S. citizen (1 = U.S. citizen, 0 = not U.S. citizen), went to trial (1 = yes, 0 = not), or had dependents (1 = yes, 0 = no) and whether the case involved a mandatory minimum sentence (1 = yes, 0 = no). Finally, a dichotomous variable was created that represents whether the case was sentenced in a circuit that has rejected the application of *Kimbrough*-based policy disagreements regarding sentences for nonproduction child pornography offenses (1 = court rejects *Kimbrough* application, 0 = court has not specifically rejected this application).<sup>12</sup> Descriptive statistics for these variables are

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<sup>11</sup> American Indian and Alaskan Natives were included as they were significantly over-represented in sexual assault cases. This is expected given that many serious sexual assault offenses that occur on Native American reservations are transferred for federal prosecution.

<sup>12</sup> Appellate decisions in circuits that have rejected the application of *Kimbrough*-based policy disagreements to child pornography offenses include the 4th, 5th, 6th, 8th, and 11th circuits—specific case citations are provided in footnotes 1 and 5. Circuits that have allowed policy disagreements for nonproduction child pornography offenses include the 1st, 2nd, 3rd, 7th, and 9th circuits. The 10th circuit did not address this question during the time frame of this research study. Because they had not specifically rejected this application, they were included in the latter group of circuits for analysis.

available in Table 1. These variables are used for matching purposes in subsequent analyses, which are discussed next.

Our second analytic approach uses propensity score matching to create a sample of child pornography and sexual abuse offenders matched on individual and case characteristics. As illustrated by the descriptive statistics presented in Table 1, child pornography offenders are predominantly older White males with at least a high-school diploma and little or no criminal history; by contrast, the typical sexual abuse offender is younger and is much more likely to be a racial minority, to have a higher criminal history score, and to have no high-school diploma. As such, it could be argued that differences in the use of judicial departures for these two types of offenders are the result of these differences in background characteristics and criminal history. Because random assignment of offense of conviction is not possible, we employ matching procedures to create a sample of child pornography offenders and comparable offenders convicted of sexual abuse offenses (Rosenbaum and Rubin, 1983; Smith, 1997; Winship and Morgan, 1999).<sup>13</sup> By using propensity score matching, we can avoid any disparities that result from unaccounted-for selection effects (Loughran et al., 2009; Smith and Paternoster, 1990).<sup>14</sup> As another test, we use these matching strategies to compare nonproduction child pornography offenders with all other offenders, regardless of offense of conviction.

In the current study, for the purposes of matching, the “treatment” in effect is whether a defendant is convicted of a child pornography offense. Depending on the analysis conducted, the

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<sup>13</sup> Matching for all models is performed using the PSMATCH2 command in STATA 12 (StataCorp, College Station, TX). For the purposes of the analyses, both 1-to-1 matching without replacement and 1-to-1 matching with replacement were used. Other matching strategies were reviewed, including *n*-to-1 matching with replacement, none of which significantly affected the results of the analyses. As 1-to-1 matching is considered the most robust matching approach, this is the method presented to demonstrate the strength of the relationship. Matching commanders were assessed using several calipers, including 0.01, 0.02, and 0.05. The caliper of 0.05 was ultimately chosen because it allowed for the matching of the highest number of offenders.

<sup>14</sup> For an explanation of propensity score matching used for analysis of sentencing departures, see Johnson and Kurlychek (2012).

comparison group is either the population of sexual abuse offenders or all non-child pornography offenders. The first set of matching analyses compares child pornography offenders with sexual abuse offenders, as this represents a comparison that is commonly discussed in the literature on child pornography sentencing. We also conduct analyses using child pornography offenders who are matched to all other federally convicted felony offenders, regardless of offense type. We use Tobit regression and the matched samples to test the robustness of the findings from the initial model.

The final stage of the analysis focuses on the reasons given by judges for their application of downward departures for individual offenders. Although many challenges are inherent in attempting to conduct meaningful statistical analysis on judicial reasoning for sentencing below the guidelines, we suggest that this first attempt to review the reasons given for departures in child pornography cases can provide additional insight into judicial decision making in these types of cases. Within the federal sentencing data, judicial reasoning is coded somewhat arbitrarily, resulting in hundreds of possible reason codes that are not easily consolidated. The descriptions of these codes also are somewhat vague and require considerable interpretation.<sup>15</sup> Within this immensity of information, however, there are opportunities to make some speculative conclusions. For example, the number of times that a particular reason code has been employed can tell us the frequency in which these reasons are given for particular offenses.

Along with this reason variable, those coded as “other” are accompanied with explanatory text, which offers potentially more insight. It may be that these “other” reasons for downward departures are those that go beyond what is included in the sentencing guideline

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<sup>15</sup> A full list of reason codes available in the federal sentencing data set is available from the U.S. Sentencing Commission website at [http://www.ussc.gov/Research\\_and\\_Statistics/Datafiles/Variable\\_Codebook\\_for\\_Individual\\_Offenders.pdf](http://www.ussc.gov/Research_and_Statistics/Datafiles/Variable_Codebook_for_Individual_Offenders.pdf), last accessed on July 24, 2013.

options for departures or are cases in which the judge felt obligated to provide a more nuanced account of their departure decision. We calculate the rate at which judges use this “other” option by offense category, and we examine the textual accounts of these “other” reasons for departing. This allows us to determine the rate at which judges go outside the traditionally accepted reasons for giving a below-guideline sentence.

## **Findings**

Table 2 provides results from the Tobit regression analysis examining the effects of being convicted of a nonproduction child pornography offense compared with sexual abuse offenses on departure likelihood and magnitude using the full population of offenders convicted of these offense types. The results of this analysis reveal that the use of judicial downward departures increases by a factor of 11.70 for offenders convicted of nonproduction child pornography compared with those convicted of sexual abuse offenses. These results document that legally irrelevant offender characteristics, including race/ethnicity, gender, age, and education, are not statistically significant in determining the likelihood of a judicial downward departure. In fact, the only statistically significant predictors of this outcome are legally relevant variables, such as the offender’s criminal history score, offense severity score, presumptive sentence, whether the offender was subject to a mandatory minimum sentence, and whether the offender was detained prior to conviction. Additionally, whether the case was in a circuit that rejected policy disagreements for child pornography offenders was statistically significant. However, the best predictor of receiving a judicial downward departure is whether the offender was convicted of a nonproduction child pornography crime rather than a sexual abuse offense.

Insert table 2 about here

To show the robustness of these findings, we use propensity score matching to create a sample of nonproduction child pornography offenders and a matched sample of sexual assault offenders. Table 3 shows the results of the matching procedure and demonstrates that the prematch samples have significant differences between sexual abuse and child pornography offenders. Prior to matching, significant differences ( $p < .001$ ) were found between the nonproduction child pornography and sexual abuse cases. The only variables on which these offenders did not differ was the average number of counts of conviction ( $p = .841$ ) and whether the case occurred in a circuit that rejected policy disagreement application to child pornography offenders ( $p = .998$ ). After propensity score matching was implemented, the 1-to-1 matching balanced the independent variables effectively and produced a matched sample of cases for subsequent analyses.<sup>16</sup> This final matched sample produced two groups (nonproduction child pornography and sexual abuse offenders) that are comparable on all other independent variables in the model.

Insert table 3 about here

To demonstrate that the previous results are not an artifact of the type of matching procedure used and that the effects of nonproduction child pornography offender status on judicial downward departures are robust, several matching methods were employed. The effect sizes of nonproduction child pornography offense conviction are provided based on four different propensity models, using two different comparison groups. First, the nonproduction child pornography group was matched to sexual abuse cases using 1-to-1 matching, which is the strictest form of matching. Second, 1-to-1 matching with replacement was used with the same group of cases. This approach increased the number of matched cases so that a larger proportion

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<sup>16</sup> Using this rigorous matching method limited the sample size to 672 matched cases, resulting in 336 matched cases in nonproduction child pornography and sexual assault cases each.

of child pornography offenders were matched. These two matching methods (1-to-1 nonreplacement and 1-to-1 with replacement) were then used to match nonproduction child pornography offenders to offenders convicted of any other type of offense.<sup>17</sup> The results from the analyses using propensity score matching help to support the robustness of the findings in Table 2.

The results from the Tobit regression analyses performed using the four matched samples are presented in Table 4. The results from the four models are consistent regardless of the matching procedure or comparison group used. The range of estimates indicates that the likelihood of receiving a judicial downward departure increased between factors of 3.85 and 35.79 for those convicted of nonproduction child pornography offenses. Recall from Table 2 that using the unmatched population of child pornography offenders resulted in an increase in use of judicial downward departures by 11.70 when compared with sexual abuse offenses. When using 1-to-1 matching for the same group of offenders, this finding remains relatively consistent with an increase in the use of judicial downward departures for nonproduction child pornography offenders by a factor of 19.27. These effects for those convicted of nonproduction child pornography offenses remain statistically significant across all models and produce relatively high estimates.

Insert table 4 about here

Following the approach applied by Johnson and Kurlychek (2012) and Kurlychek and Johnson (2010), the Tobit coefficients were decomposed to examine separately the effect of being convicted of nonproduction child pornography on the probability of receiving a judicial downward departure and on the magnitude of the departure received. Using the 1-to-1 model

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<sup>17</sup> Nearest-neighbor and additional methods of matching were tested beyond those listed in the article. The results from the analyses remained consistent regardless of the matching techniques that were applied.

without replacement and following the formulas in Osgood, Finken, and McMorris (2002), the results of the decomposition along with 95% confidence intervals are presented in Table 5. This table includes the decomposition for both the full-population Tobit regression model in Table 2 as well as the matched Tobit model presented in Table 4. The results of this model show that conviction for nonproduction child pornography significantly affects both the likelihood and the magnitude of judicial downward departure decisions. Nonproduction child pornography offenders are approximately 32% more likely than offenders convicted of sexual abuse to receive a judicial downward departure, and when they do, their sentence discounts are almost 83% larger in the full-population model. These findings also are reflected in the decomposition of the sample of matched offenders with an approximately 25% increase in the probability of receiving a judicial downward departure and of receiving a sentence discount that is more than 83% longer.

Insert table 5 about here

### ***Reasons for Downward Departures***

Although the quantitative analyses lend support for the hypothesis that judges are more likely to use downward departures for nonproduction child pornography offenders than for other types of offenders (including those convicted of sexual abuse), a closer examination of the reasons provided by judges for departure sentences in these cases could provide additional insights. When departing from the U.S. sentencing guidelines, federal judges are asked to provide reasons for giving a sentence that deviates from the recommended sentence. In the federal sentencing data provided by the USSC, these reasons are coded and identified for upward, substantial assistance, and below guideline departures. Unfortunately, grouping these reasons into meaningful categories is difficult and gleaning insight into judicial decision-making processes based on this limited information might not provide an accurate portrayal of whether these



decisions are based on individual offender circumstances or on judicial disagreement with the federal sentencing guidelines for child pornography offenses. Although they are not suitable for a quantitative analysis, delving deeper into these reasons for judicial departures in a qualitative fashion might prove useful in discerning whether judges are deliberately imposing sentences below the guideline range based on a fundamental disagreement with the policies of the USSC.

The most common reasons given by U.S. sentencing judges for the use of downward departures are all based on 18 U.S.C. § 3553, which articulates various factors to be considered during the imposition of a sentence. The top three reasons given by judges for the use of downward departures in child pornography cases are the “*Nature and circumstances of offense and history and character of defendant (18 3553(a)(1))*,” “*Reflect seriousness of offense, promote respect for law, provide just punishment for the offense (18 3553(a)(2)(A))*,” and “*Afford adequate deterrence to criminal conduct (18 3553(a)(2)(B))*.” Unfortunately, the nondescriptive nature of these reasons does not provide much insight into whether judges are using these to express categorical disagreement with the sentencing policy or whether these are individualized assessments or some combination of the two.

Perhaps one area in which we can glimpse at the specific intentions of the sentencing judges is in the use of reasons that do not neatly fit into a specific category for coding purposes. A departure reason can be placed into hundreds of possible categories. Within the large number of possible reason codes available within the federal data, delving into those that do not fit into this coding structure could provide more insight. These textual explanations for guideline departures count as “other” within the coding system offer more meaning into the exact reasoning the judge provided.

The first step in examining these textual departure reasons is calculating the frequency with which judicial reasons do not fit within the traditional departure reasons. To assess this, the number of textual reasons offered for each offense category was counted and the rate per 1,000 cases was calculated. Table 6 provides the rate at which judicial explanations for downward departures were classified as “other” coding option. The rate at which judicial explanations fit within this “other” option for judicial downward departures is higher for nonproduction child pornography than for any other offense type. This finding suggests that judges might apply more nuanced explanations when using downward departures for child pornography offenses.

This result is further confirmed by the substance of the text descriptions provided for the reasons given for below guideline sentences for child pornography offenses. For example, judges noted that:

- “2G2.2 [child pornography guideline] *fundamentally flawed*”
- “*Judge categorical disagreement with 2G2.2 enhancements including computer use and prepub [prepubescent] child and no [number] of images*”
- “*BOL [baseline offense level] has increased without factual basis over time*”
- “*Departs 2 levels double counting*”
- “*Usage of computer enhances penalty court sees this as artificial*”
- “*Ct [court] views actions of Congress regarding these types of cases as unreasonable*”
- “*The constitutional problems involved in putting the conduct to this deft [defendant] in this particular statute*”
- “*Courts are sentencing defts [defendants] below the gl [guideline] range in child porn cases in 40 percent of all cases*”

- “*Computer SOC* [specific offense characteristics-, i.e., enhancements] *is given despite being used in almost every case before the courts*”

Furthermore, the sentencing judges provided reference to several circuit court opinions that, as discussed, authorize them to depart from the guidelines based on disagreements with the sentencing policy. For example, some of the textual explanations for downward departures included reference to “*Dorvee*,” “*US v. Dorvee*,” “*US v. Henderson 9<sup>th</sup> Cir.*,” and “*US v. Gellatly*,” all of which are court cases that allow for the use of policy disagreements for child pornography cases.

These types of textual reasons are not given to sexual abuse offenders. First, as noted in Table 6, textual reasoning for judicial downward departures for sexual abuse offenders occurs at a much lower rate than for nonproduction child pornography offenders. In the 2 years of sentencing data, textual explanations for judicial downward departures occurred in only 11 of 792 sexual abuse offenders compared with 86 of the 3,359 nonproduction child pornography offenders (rates of 13.89 to 25.60 per 1,000, respectively). Additionally, the contents of these reasons tend to be specific to the individual offender rather than addressing the guideline policy. For example, reasons given for sexual abuse offenders include “*defendant had a very difficult life*,” “*level of intoxication at time of offense*,” “*defendants life expectancy is substantially below the range*,” “*sexual activity was driven in part by alcohol*,” “*first involvement in sexual contact with a minor*,” among others.

Insert table 6 about here

## Conclusion

In a 2011 policy essay, Rodney Engen posed a question to sentencing scholars that asked, “How are we to evaluate the exercise of judicial discretion, or changes in sentencing disparity, relative

to guidelines that many observers, including federal judges, believe are unjust?” (Engen, 2011: 1145). Additionally, Engen encouraged scholars to evaluate sentencing policy by looking beyond issues of disparity toward the substantive meaning of “justice.” Some criminal laws do not reflect a rational and dispassionate assessment of the harm done by the crime, and their penalty structures, therefore, might not incorporate “normative expectations for appropriate punishment” (Engen, 2011: 1145; see also Frase, 2007). If this is the case, then federal district judges may use their discretion at sentencing—including their discretion to depart from the sentencing range called for by sentencing guidelines—to craft a sentence tailored to their perceptions of the seriousness of the crime. This study presents an opportunity to explore the use of judicial departures that potentially “enhance substantive justice by mitigating the impact of sentencing laws that many view as excessively harsh” (Engen, 2011: 1145).

This research provides one of the first empirical examinations of federal judicial downward departures for offenders convicted of nonproduction child pornography, a crime that has received growing attention in the courts and legislature. Furthermore, this study offers a unique contribution to the body of literature on federal sentencing as it examines the possible consequences of unwarranted similarity in the sentences imposed on defendants convicted of dissimilar conduct. The current discourse surrounding the use of policy disagreement for judicial downward departures in the sentencing of child pornography offenders led to the hypothesis that judges would be more likely to depart from the guidelines for these offenders compared with others. In line with the findings from Hamilton (2014), the findings from this study support this hypothesis and demonstrate statistically significant differences in both the likelihood and magnitude of judicial downward departures for child pornography offenders, net of individual- and case-level characteristics. These findings, coupled with the reasons that judges give when

departing, suggest that judges believe that the guidelines for nonproduction child pornography offenses are overly harsh.

The results of the current study have important implications for sentencing research, as they suggest that judges are using downward departures for reasons not always captured by the traditional individual- or case-level characteristics commonly assessed in sentencing research. In other words, judges are using these policies not to mitigate the harshness of the sentences mandated for *certain types* of sympathetic or salvageable offenders (Nagel and Shulhofer, 1992; Spohn and Fornango, 2009), but because of inherent disagreement with the severity of the sentences called for by the guidelines for the *typical offender* convicted of a nonproduction child pornography offense. By attempting to circumvent what they view as flawed and overly punitive sentencing policies, judges might be using their discretion to craft sentences that are more appropriate. The reasons provided by judges for downward departures in child pornography cases lend credence to this argument. Many judges who departed from the presumptive sentence did so because of disagreement with the sentencing policies (and the resulting presumptive sentences) adopted for these types of cases.

Recent sentencing research has focused on the possible detrimental consequences of discretion and its potential for producing unwarranted disparity in sentences imposed on offenders based on race, ethnicity, sex, and age (Spohn, 2000; U.S. Sentencing Commission, 2004; Zatz, 2000). Scholars also have assessed the impact of court cases such as *Booker*, *Gall*, and *Kimbrough*, with the assumption that any increase in disparity resulting from these cases would suggest a return to unfair sentencing practices where race/ethnicity, sex, and age are inappropriately considered in the sentencing process. Although this line of research is undoubtedly important, in that discovering any avenue for the biased consideration of these

factors is necessary to provide possible remedies, it seems to be based on a belief that judges or other court actors are either disinclined or incapable of using discretion in a logical and rational manner. The common assumption underlying this line of research is that the guidelines work to limit or minimize disparity (Engen, 2011). There has been, however, a push toward challenging this assumption in our approach to guideline-based research (Bushway and Piehl, 2007; Engen, 2009; Kramer, 2009; Ulmer et al., 2011a, 2011b). An alternative approach, and one that has not been systematically tested (Kramer and Ulmer, 2002; Johnson and Kurlychek, 2012; Ortiz and Spohn, 2014), is that the use of discretion could be a possible remedy to counteract regulations that lead to inherent biases.

The findings of this current study offer important implications for federal sentencing policy. Specific to child pornography sentencing, this analysis supports and provides an extension of the conclusions presented by the USSC's study on child pornography sentencing (2012). The USSC report (2012) offered several recommendations for changes to this sentencing policy. First, the USSC report contended that the current sentencing scheme for child pornography offenders uses outdated measures of culpability and, therefore, imparts sentencing ranges that are too severe. The USSC recommends amending the guidelines to provide a more nuanced assessment of the severity of these offenses. Factors such as the nature of the offender's collection behavior, the degree of engagement with other offenders, and history of sexually abusive, exploitive, or predatory conduct should be incorporated into the enhancement considerations (U.S. Sentencing Commission, 2012). The USSC recommendations also include the reevaluation of the use of enhancements for child pornography offenses. The enhancement imposed for use of a computer, for example, is outdated in the current context of child pornography offenses as most offenders use a computer in the commission this crime.

Sentencing enhancements are to represent aggravated offense characteristics, and therefore, the application of such enhancements to almost all offenders is inappropriate. These changes to the sentencing guidelines for nonproduction child pornography offenders could increase the perceived legitimacy of these policies in the eyes of sentencing judges, thus, reducing the number of downward departures.

The issues related to the child pornography sentencing system represent a growing concern with sentencing policies in general, that of keeping up with technological advancements. This concern is perhaps most evident in the use of a computer enhancement for increasing the sentencing recommendation for child pornography offenders. Statutes written or adapted from two decades ago might not be relevant for judges sentencing defendants in the 21st century. This growing disconnect between sentencing policy and the technology used by offenders in the commission of crimes leaves judges with outdated standards for guidance in sentencing these types of offenses. Additionally, the USSC states that sentencing policies should “reflect the advancement in the knowledge of human behavior as it relates to the criminal justice system” (U.S. Sentencing Commission, n.d.). A substantial amount of empirical research on offenders has been conducted over the past several decades. Sentencing policies, however, do not seem to reflect many of the findings of this research, particularly with respect to child pornography offenses. As such, outdated policies could provide inappropriate guidance to sentencing judges.

The use of policy disagreements in judicial downward departures underscores broader policy implications for the findings presented in this study beyond those related to child pornography. Particularly, the use of policy disagreement departures demonstrates a possible lack of institutional legitimacy of the USSC and emphasizes the need for accurate and empirically informed sentencing policies. The authorization of judges to disregard sentencing

guidelines based on a categorical policy disagreement suggests the potential for the reduced legitimacy of the guidelines system as a whole. Guidelines without reasons may result in the potential loss of legitimacy of the guideline system that can have far-reaching implications for sentencing. If judges cannot rely on the guidelines to provide just and informed guidance, then they might be less likely to refer to the guidelines when making sentencing decisions.

In a recent article, Hessick (2014) offered three notable recommendations for changing the current U.S. sentencing guideline system and enhancing the legitimacy of the USSC. First, Hessick recommended that the USSC provide detailed explanations for its policy decisions. The U.S. sentencing guidelines undergo numerous revisions, and although these amendments are subject to a notice and comment process, the USSC does not currently provide detailed explanations for proposed changes. Second, Hessick suggested that the guidelines that have been the subject of repeated judicial disagreement be amended. This change could include amendments to controversial guidelines such as the crack–powder-cocaine disparity, child pornography offenses, career offender enhancements, among others. Finally, Hessick, after acknowledging the role of Congress in decisions regarding sentencing guidelines, suggested that the USSC consider encouraging legislative action that would increase the legitimacy of the Commission as an institution. For example, Hessick noted that most amendments to the guidelines have increased the severity of sentences. This “one-way ratchet,” according to Hessick, “undermines the image of the Commission as a neutral, expert body” (Hessick, 2014: 1374). Additionally, it has been argued that the USSC disproportionately favors prosecutors and has no representation for defense counsel in its membership (Barkow, 2005; Hessick, 2014). Hessick argued that increasing representation of the defense community could increase the institutional legitimacy of the Commission’s actions by demonstrating a more neutral and



balanced agenda. The findings of this current study underscore the extent to which sentencing judges may go to circumvent guideline policies that are considered overly harsh and unjust. These types of policies might further demonstrate a lack of institutional legitimacy of the USSC. These recommendations could reestablish the central role of the U.S. sentencing guidelines in judicial decision making.

The federal sentencing guidelines were developed in part to address the problem of unwarranted disparity in sentencing decisions and to reestablish the legitimacy of the criminal court system (Savelsberg, 1992). The sentencing guidelines are supposed to guide and advise judges as they attempt to tailor sentences that fit offenders as well as their crimes. The success of this process rests on judges' faith in the legitimacy of the policies they are asked to implement; however, given the highly political process in which these guidelines are constructed, the ability to establish formal-rational policies is limited. As the courts' authority to disregard the guidelines has increased in the wake of several Supreme Court decisions, the establishment of reasonable and legitimate sentencing policies becomes even more necessary to ensure continued progress toward fair and equitable sentencing practices. The future of sentencing policy should consider the possible consequences associated with the implementation of fundamentally flawed guidelines. The legitimacy of the guideline system might be diminished when the policies are deemed unreasonable.

## References

- Albonetti, Celesta A. 1991. An integration of theories to explain judicial discretion. *Social Problems*, 38: 247–266.
- Albonetti, Celesta A. 1997. Sentencing under the Federal Sentencing Guidelines: Effects of defendant characteristics, guilty pleas, and departures on sentence outcomes for drug offenses, 1991–1992. *Law & Society Review*, 31: 789–822.
- Albonetti, Celesta A. 2002. The joint conditioning effect of defendant's gender and ethnicity on length of imprisonment under the federal sentencing guidelines for drug trafficking/manufacturing offenders. *Journal of Gender, Race & Justice*, 6: 39–60.
- Babchishin, Kelly M., R. Karl Hanson, and Chantal A. Hermann. 2011. The characteristics of online sex offenders: A meta-analysis. *Sexual Abuse: A Journal of Research and Treatment*, 23: 92–123.
- Barkow, Rachel E. 2005. Administering crime. *UCLA Law Review*, 52: 715–814.
- Basbaum, Jesse P. 2010. Inequitable sentencing for possession of child pornography: A failure to distinguish voyeurs from pederasts. *Hastings Law Journal*, 61: 1281–1305.
- Ben-Yehuda, Nachman. 1990. *The Politics and Morality of deviance: Moral Panics, Drug Abuse, Deviant Science, and Reversed Stigmatization*. New York: University of New York Press.
- Bourke, Michael L. and Andres E. Hernandez. 2009. The “Butner Study” redux: A report of the incidence of hands-on child victimization by child pornography offenders. *Journal of Family Violence*, 24: 183–191.

- Bridges, George S. and Sara Steen. 1998. Racial disparities in official assessments of juvenile offenders: Attributional stereotypes as mediating mechanisms. *American Sociological Review*, 63: 554–570.
- Buschman, Jos, Dan Wilcox, Donald Krapohl, Marty Oelrich, and Simon Hackett. 2010. Cybersex offender risk assessment. An explorative study. *Journal of Sexual Aggression*, 16: 197–209.
- Bushway, Shawn D. and Anne Morrison Piehl. 2007. Social science research and the legal threat to presumptive sentencing guidelines. *Criminology & Public Policy*, 6: 461–482.
- Cano, Mario V. and Cassia C. Spohn. 2012. Circumventing the penalty for offenders facing mandatory minimums: Revisiting the dynamics of “sympathetic” and “salvageable” offenders. *Criminal Justice and Behavior*, 39: 308–332.
- Cohen, Stanley. 2002. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, 3rd Edition. New York: Routledge.
- Engen, Rodney L. 2009. Assessing determinate and presumptive sentencing—Making research relevant. *Criminology & Public Policy*, 8: 323–336.
- Engen, Rodney L. 2011. Racial disparity in the wake of Booker/Fanfan: Making sense of “messy” results and other challenges for sentencing research. *Criminology & Public Policy*, 10: 1139–1149.
- Engen, Rodney L., Randy R. Gainey, Robert D. Crutchfield, and Joseph G. Weis. 2003. Discretion and disparity under sentencing guidelines: The role of departures and structured sentencing alternatives. *Criminology*, 41: 99–130.
- Frankel, Marvin E. 1972. Lawlessness in sentencing. *University of Cincinnati Law Review*, 41: 1–54.

- Frase, Richard S. 2007. The Apprendi-Blakely cases: Sentencing reform counter revolution? *Criminology & Public Policy*, 6: 403–431.
- Gavin, Helen. 2005. The social construction of the child sex offender explored by narrative. *The Qualitative Report*, 103: 395–415.
- Griffin, Timothy and John Wooldredge. 2006. Sex-based disparities in felony dispositions before and after sentencing reforms in Ohio. *Criminology*, 44: 893–923.
- Hamilton, Melissa. 2011. The efficacy of severe child pornography sentencing: Empirical validity or political rhetoric? *Stanford Law & Policy Review*, 22: 545–586.
- Hamilton, Melissa. 2014. Sentencing adjudication: Lessons from child pornography policy nullification. *Georgia State University Law Review*, 30: 375–460.
- Hartley, Richard D., Sean Maddan, and Cassia C. Spohn. 2007. Prosecutorial discretion: An examination of substantial assistance departures in federal crack-cocaine and powder-cocaine cases. *Justice Quarterly*, 24: 382–407.
- Hawkins, Darnell F. 1981. Causal attributions and punishment for crime. *Deviant Behavior*, 2: 207–230.
- Hessick, Carissa Byrne. 2011. Disentangling child pornography from child sex abuse. *Washington University Law Review*, 88: 853–902.
- Hessick, Carissa Byrne. 2014. A critical view of the Sentencing Commission’s recent recommendations to “strengthen the guidelines system.” *Houston Law Review*: 51: 1335–1379.
- Hinds, Lyn and Kathleen Daly. 2001. The war on sex offenders: Community notification in perspective. *Australian & New Zealand Journal of Criminology*, 34: 256–276.

- Howitt, Dennis and Kerry Sheldon. 2007. *Sex Offenders and the Internet*. West Sussex, U.K.: Wiley & Sons.
- Jenkins, Philip. 1998. *Moral Panic: Changing Concepts of the Child Molester in Modern America*. New Haven, CT: Yale University Press.
- Jenkins, Philip. 2001. *Beyond Tolerance: Child Pornography on the Internet*. New York: New York University Press.
- Johnson, Brian D. and Megan C. Kurlychek. 2012. Transferred juveniles in the era of sentencing guidelines: Examining judicial departures for juvenile offenders in adult criminal court. *Criminology*, 50: 525–564.
- Johnson, Brian D., Jeffery T. Ulmer, and John H. Kramer. 2008. The social context of guidelines circumvention: The case of federal district courts. *Criminology*, 46: 737–783.
- Kautt, Paula and Cassia C. Spohn. 2002. Cracking down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences. *Justice Quarterly*, 19: 1–35.
- Koons-Witt, Barbara A. 2002. The effect of gender on the decision to incarcerate before and after the introduction of sentencing guidelines. *Criminology*, 40: 297–328.
- Kramer, John H. 2009. Mandatory sentencing guidelines: The framing of justice. *Criminology & Public Policy*, 8: 313–321.
- Kramer, John H. and Jeffery T. Ulmer. 1996. Sentencing disparity and departures from guidelines. *Justice Quarterly*, 13: 81–106.
- Kramer, John H. and Jeffery T. Ulmer. 2002. Downward departures for serious violent offenders: Local court “corrections” to Pennsylvania's sentencing guidelines. *Criminology*, 40: 897–932.

- Kurlychek, Megan and Brian D. Johnson. 2010. Juvenility and punishment: Sentencing juveniles in adult criminal court. *Criminology*, 48: 725–758.
- Loughran, Thomas A., Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero, and Sandra H. Losoya. 2009. Estimating a dose-response relationship between length of stay and future recidivism in serious juvenile offenders. *Criminology*, 47: 699–740.
- Michelman, Scott and Jay Rorty. 2012. Doing Kimbrough justice: Implementing policy disagreements with the federal sentencing guidelines. *Suffolk University Law Review*, 45: 1083–1127.
- Mustard, David B. 2001. Racial, ethnic, and gender disparities in sentencing: Evidence from the U.S. federal courts. *Journal of Law and Economics*, 44: 285–314.
- Nagel, Ilene H. and Stephen J. Schulhofer. 1992. A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines. *Southern California Law Review*, 66: 501–566.
- Ortiz, Natalie R. and Cassia C. Spohn. 2014. Mitigating the effect of a criminal record at sentencing: Local life circumstances and substantial assistance departures among recidivists in federal court. *Criminal Justice Policy Review*, 25: 3–28.
- Osgood, D. Wayne, Laura L. Finken, and Barbara J. McMorris. 2002. Analyzing multiple-item measures of crime and deviance II: Tobit regression analysis of transformed scores. *Journal of Quantitative Criminology*, 18: 319–347.
- Quinn, James F., Craig J. Forsyth, and Carla Mullen-Quinn. 2004. Societal reaction to sex offenders: A review of the origins and results of the myths surrounding their crimes and treatment amenability. *Deviant Behavior*, 25: 215–232.

- Rosenbaum, Paul R. and Donald B. Rubin. 1983. The central role of the propensity score in observational studies for causal effects. *Biometrika*, 70: 41–55.
- Sample, Lisa L. 2006. An examination of the degree to which sex offenders kill. *Criminal Justice Review*, 31: 230–250.
- Sample, Lisa L. 2011. The need to debate the fate of sex offender community notification laws. *Criminology & Public Policy*, 10: 265–274.
- Sample, Lisa L. and Colleen Kadleck. 2008. Sex offender laws: Legislators' accounts of the need for policy. *Criminal Justice Policy Review*, 19: 40–62.
- Savelsberg, Joachim J. 1992. Law that does not fit society: Sentencing guidelines as a neoclassical reaction to the dilemmas of substantivized law. *American Journal of Sociology*, 97: 1346–1381.
- Seto, Michael C. and Angela W. Eke. 2005. The criminal histories and later offending of child pornography offenders. *Sexual Abuse: A Journal of Research and Treatment*, 17: 201–210.
- Seto, Michael C., R. Karl Hanson, and Kelly M. Babchishin. 2011. Contact sexual offending by men with online sexual offenses. *Sexual Abuse: A Journal of Research and Treatment*, 23: 124–145.
- Smith, Douglas A. and Raymond Paternoster. 1990. Formal processing and future delinquency: Deviance amplification as selection artifact. *Law & Society Review*, 24: 1109–1131.
- Smith, Herbert L. 1997. Matching with multiple controls to estimate treatment effects in observational studies. *Sociological Methodology*, 27: 325–353.

- Spohn, Cassia C. 2000. Thirty years of sentencing reform: The quest for a racially neutral sentencing process. In *Criminal Justice 2000*, Volume 3. Washington, D.C.: National Institute of Justice.
- Spohn, Cassia C. and Robert Fornango. 2009. U.S. Attorneys and substantial assistance departures: Testing for interprosecutor disparity. *Criminology*, 47: 813–846.
- Stacey, Ann Martin and Cassia C. Spohn. 2006. Gender and the social costs of sentencing: An analysis of sentences imposed on male and female offenders in three U.S. district courts. *Berkeley Journal of Criminal Law*, 11: 43–76.
- Steffensmeier, Darrell and Stephen Demuth. 2000. Ethnicity and sentencing outcomes in U.S. federal courts: Who is punished more harshly? *American Sociological Review*, 65: 705–729.
- Steffensmeier, Darrell, Jeffery T. Ulmer, and John H. Kramer. 1998. The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology*, 36: 763–798.
- Steinbock, Bonnie. 1995. Commentaries on the issue: A policy perspective. *Criminal Justice Ethics*, 14: 4–9.
- Stolzenberg, Lisa and Stewart J. D'Alessio. 1994. Sentencing and unwarranted disparity: An empirical assessment of the long-term impact of sentencing guidelines in Minnesota. *Criminology*, 32: 301–310.
- Sutherland, Edwin H. 1950. The diffusion of sexual psychopath laws. *American Journal of Sociology*, 56: 142–148.
- Tobin, James. 1958. Estimation of relationships for limited dependent variables. *Econometrica*, 26: 24–36.



- Tonry, Michael H. 1996. *Sentencing Matters*. New York: Oxford University Press.
- U.S. Department of Justice. n.d. *Child Exploitation and Obscenity Section*. Retrieved May 29, 2013 from <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html>.
- U.S. Sentencing Commission. 2004. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*. Washington, D.C.: Author.
- U.S. Sentencing Commission. 2009. *History of the Child Pornography Guidelines*. Washington, D.C.: Author.
- U.S. Sentencing Commission. 2011. *U.S. Sentencing Commission's 2011 Annual Report*. Washington, D.C.: Author.
- U.S. Sentencing Commission. 2012. *Report to Congress: Federal Child Pornography Offenses*. Washington, D.C.: Author.
- U.S. Sentencing Commission. n.d. *Overview of the United States Sentencing Commission*. Retrieved April 15, 2013 from [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf).
- Ulmer, Jeffery T. and Brian Johnson. 2004. Sentencing in context: A multilevel analysis. *Criminology*, 42: 137–178.
- Ulmer, Jeffery T., Michael T. Light, and John H. Kramer. 2011a. The “liberation” of federal judges’ discretion in the wake of the Booker/Fanfan decision: Is there increased disparity and divergence between courts? *Justice Quarterly*, 28: 799–837.

- Ulmer, Jeffery T., Michael T. Light, and John H. Kramer. 2011b. Racial disparity in the wake of the Booker/Fanfan decision: An alternative analysis to the USSC's 2010 report. *Criminology & Public Policy*, 10: 1077–1118.
- Wang, Xia, Daniel P. Mears, Cassia C. Spohn, and Lisa Dario. 2013. Assessing the differential effects of race and ethnicity on sentence outcomes under different sentencing systems. *Crime & Delinquency*, 59: 87–114.
- Webb, Liane, Jackie Craissati, and Sarah Keen. 2007. Characteristics of Internet child pornography offenders: A comparison with child molesters. *Sexual Abuse: A Journal of Research and Treatment*, 19: 449–465.
- Wheeler, Stanton, Kenneth Mann, and Austin Sarat. 1988. *Sitting in Judgment: The Sentencing of White-Collar Criminals*. New Haven, CT: Yale University Press.
- Winship, Christopher and Stephen L. Morgan. 1999. The estimation of causal effects from observational data. *Annual Review of Sociology*, 25: 659–706.
- Wolak, Janis, David Finkelhor, and Kimberly Mitchell. 2011. Child pornography possessors: Trends in offender and case characteristics. *Sexual Abuse: A Journal of Research and Treatment*, 23: 22–42.
- Wooldredge, John and Timothy Griffin. 2005. Displaced discretion under Ohio sentencing guidelines. *Journal of Criminal Justice*, 33: 301–316.
- Zatz, Marjorie S. 2000. The convergences of race, ethnicity, gender and class on court decision making: Looking towards the 21st century. In *Criminal Justice 2000*, Volume 3) (pp. 503-552). Washington, D.C.: National Institute of Justice.
- Zgoba, Kristen M. 2004. Spin doctors and moral crusaders: The moral panic behind child safety legislation. *Criminal Justice Studies*, 17: 385–404.

## **Court Cases Cited**

*Gall v. United States*, 552 U.S. 38 (2007).

*Kimbrough v. United States*, 552 U.S. 85 (2007).

*Rita v. United States*, 551 U.S. 338 (2007).

*United States v. Bistline*, 665 F. 3d 758 (6th Cir. 2012).

*United States v. Black*, 670 F. 3d 877 (8th Cir. 2012).

*United States v. Booker*, 543 U.S. 220 (2005).

*United States v. Dorvee*, 616 F. 3d 174 (2nd Cir. 2010).

*United States v. Garthus*, 652 F. 3d 715 (7th Cir. 2011).

*United States v. Gellatly*, 2009 U.S. Dist. LEXIS 2693 (D. Neb. 2009)

*United States v. Grober*, 624 F. 3d 592 (3rd Cir. 2010).

*United States v. Halliday*, 672 F. 3d 462 (7th Cir. 2012).

*United States v. Henderson*, 649 F. 3d 955 (9th Cir. 2011).

*United States v. Huffstatler*, 571 F. 3d 620 (7th Cir. 2009).

*United States v. Miller*, 665 F. 3d 114 (5th Cir. 2011).

*United States v. Mohr*, 418 F. App'x 902 (11th Cir. 2011).

*United States v. Pape*, 601 F. 3d 743 (7th Cir. 2010).

*United States v. Pugh*, 515 F. 3d 1179 (11th Cir. 2008).

*United States v. Stone*, 575 F. 3d 83 (1st Cir. 2009).

*United States v. Strieper*, 666 F. 3d 288 (4th Cir. 2012).

## **Statutes Cited**

PROTECT Act of 2003, Pub. L. 108-21, 117 Stat. 650, S. 151, enacted April 30, 2003;  
amendment Stat. 667.

Sentencing Reform Act of 1984, Pub. L. 112-283, (codified as amended at 18 U.S.C. § 3551-3586).

**Table 1. Descriptive Statistics for Sex Abuse and Nonproduction Pornography Cases Before Propensity Score Matching**

| <b>Variable</b>                           | <b>Sex Abuse<br/>(<i>n</i> = 792)</b> | <b>Nonproduction<br/>Pornography<br/>(<i>n</i> = 3,359)</b> |
|---|---------------------------------------|---|
| Dependent Variable                        |                                       |   |
| Judicial downward                         | 16.86                                 | 46.35   |
| Mean sentence discount length (in months) | 15.74                                 | 26.33   |
| Standard deviation                        | 87.95                                 | 46.12   |
| Independent Variables                     |                                       |   |
| Case characteristics                      |                                       |   |
| Trial                                     | 12.72                                 | 3.36  |
| Detained presentence                      | 82.40                                 | 57.41   |
| Offender characteristics                  |                                       |   |
| Mean age                                  | 37.07                                 | 42.24   |
| Standard deviation                        | 12.90                                 | 13.32   |
| Range                                     | 17-79                                 | 19-88   |
| Percent male                              | 95.33                                 | 99.17   |
| Percent college                           | 35.85                                 | 55.09   |
| Percent high school only                  | 37.52                                 | 34.87   |
| Percent no high-school diploma            | 26.63                                 | 10.04   |
| Percent White                             | 33.84                                 | 88.68   |
| Percent Black                             | 12.18                                 | 3.01  |
| Percent American Indian/Alaskan Native    | 40.31                                 | 0.54  |
| Percent Hispanic                          | 9.39                                  | 6.31  |
| Percent other race                        | 4.28                                  | 1.46  |
| Percent U.S. citizen                      | 94.56                                 | 97.38   |
| Percent with dependents                   | 49.87                                 | 30.89   |
| Guideline factors                         |                                       |   |
| Mean presumptive sentence (in months)     | 124.72                                | 118.20  |
| Mean criminal history score               | 1.80                                  | 1.34  |
| Standard deviation                        | 1.40                                  | 0.85  |
| Mean offense severity score               | 27.98                                 | 30.21   |
| Standard deviation                        | 7.97                                  | 5.02  |
| Number of counts                          | 1.41                                  | 1.39  |
| Standard deviation                        | 1.17                                  | 1.38  |
| Range                                     | 1-14                                  | 1-28  |
| Mean circuit reject policy disagreement   | 48.61                                 | 54.27   |
| Mean mandatory minimum case               | 35.10                                 | 51.09   |

# JUDICIAL DOWNWARD DEPARTURES FOR CHILD PORNOGRAPHY

**Table 2. Tobit Regression Model of (Ln) Judicial Downward Departures for Unmatched Nonproduction Child Pornography and Sexual Abuse Offenders**

| Variable                                  | Downward Departure |           | Exp( <i>b</i> )<br>*** |
|---|--------------------|-----------|------------------------|
|   | <i>b</i>           | SE        |                        |
| Nonproduction child pornography offenders | 2.46               | 0.23      | 11.70***               |
| Trial                                     | -0.08              | 0.29      |                        |
| Detained presentence                      | -1.94              | 0.13      | 0.14***                |
| Age                                       | -0.02              | 0.00      |                        |
| Male                                      | 0.72               | 0.56      |                        |
| College                                   | 0.03               | 0.13      |                        |
| No high-school diploma                    | -0.02              | 0.20      |                        |
| Black                                     | 0.46               | 0.32      |                        |
| Hispanic                                  | -0.02              | 0.25      |                        |
| American Indian/Alaskan Native            | 0.26               | 0.34      |                        |
| U.S. citizen                              | 0.61               | 0.38      |                        |
| Number of dependents                      | -0.18              | 0.13      |                        |
| Presumptive sentence                      | 0.01               | 0.00      | 1.01***                |
| Criminal history score                    | -0.41              | 0.08      | 0.66***                |
| Offense severity score                    | 0.16               | 0.03      | 1.17***                |
| Circuit reject policy disagreement        | -0.72              | 0.12      | 0.49***                |
| Mandatory minimum case                    | -1.15              | 0.15      | 0.32***                |
| Constant                                  | -3.35              | 0.68      | —***                   |
| Sigma                                     |                    | 2.95      |                        |
| Log likelihood                            |                    | -4,842.34 |                        |
| <i>N</i>                                  |                    | 3,126     |                        |

Notes. Nonproduction = possession, receipt, distribution, and transportation; SE = standard error. Exponentiated betas shown only for variables with statistical significance.

\*\*\*  $p < .001$ .

# JUDICIAL DOWNWARD DEPARTURES FOR CHILD PORNOGRAPHY

**Table 3. Descriptive Statistics for Sex Abuse and Child Pornography Offenders Before and After Propensity Score Matching<sup>a</sup>**

| Variable                                 | Full Sample  |                                 |         | Matched Sample |                                 |         |
|--|--------------|---------------------------------|---------|----------------|---------------------------------|---------|
|  | Sexual Abuse | Nonproduction Child Pornography | P Value | Sexual Assault | Nonproduction Child Pornography | p Value |
| Variables                                |              |                                 |         |                |                                 |         |
| Downward judicial departures             | 16.86        | 46.35                           | <.001   | 19.05          | 49.45                           | <.001   |
| Independent Variables                    |              |                                 |         |                |                                 |         |
| Case characteristics                     |              |                                 |         |                |                                 |         |
| Trial                                    | 12.72        | 3.36                            | <.001   | 12.32          | 11.44                           | .723    |
| Detained presentence                     | 82.40        | 57.41                           | <.001   | 80.06          | 86.80                           | .018    |
| Offender characteristics                 |              |                                 |         |                |                                 |         |
| Mean age                                 | 37.07        | 42.24                           | <.001   | 38.88          | 39.25                           | .710    |
| Percent male                             | 95.33        | 99.17                           | <.001   | 82.40          | 82.40                           | 1.000   |
| Percent college                          | 35.85        | 55.09                           | <.001   | 45.75          | 43.98                           | .645    |
| Percent no high-school diploma           | 26.63        | 10.04                           | <.001   | 14.66          | 17.01                           | .402    |
| Percent Black                            | 12.18        | 3.01                            | <.001   | 10.85          | 10.26                           | .804    |
| Percent American Indian/Alaskan Native   | 40.31        | 0.54                            | <.001   | 3.52           | 4.69                            | .441    |
| Percent Hispanic                         | 9.39         | 6.31                            | <.002   | 12.90          | 12.90                           | 1.000   |
| Percent U.S. citizen                     | 94.56        | 97.38                           | <.001   | 93.55          | 92.38                           | .550    |
| Percent with dependents                  | 49.87        | 30.89                           | <.001   | 43.40          | 43.70                           | .939    |
| Guideline factors                        |              |                                 |         |                |                                 |         |
| Presumptive sentence                     | 124.72       | 118.20                          | .015    | 119.41         | 128.80                          | .160    |
| Mean criminal history score              | 1.80         | 1.34                            | <.001   | 1.59           | 1.60                            | .899    |
| Mean offense severity score              | 27.98        | 30.21                           | <.001   | 29.05          | 28.59                           | .329    |
| Number of counts                         | 1.41         | 1.39                            | .841    | 1.48           | 1.56                            | .583    |
| Mean circuits reject policy disagreement | 48.61        | 54.27                           | .998    | 56.89          | 56.01                           | .817    |
| Mean mandatory minimum case              | 35.10        | 51.09                           | 1.000   | 53.96          | 49.56                           | .251    |
| <i>n</i>                                 |              | 3,320                           |         |                | 672                             |         |

*Notes.* Nonproduction child pornography = possession, receipt, distribution, or transportation of child pornography. Cases involving the production of child pornography were excluded.

<sup>a</sup> One-to-one matching without replacement.

**Table 4. Tobit Regression Models of (ln) of Judicial Downward Departures for Child Pornography Offenders and Matched Group of Offenders**

| Child Pornography <sup>a</sup> vs. Matched Sexual Abuse    |          |          |                 |                  |          |                 |
|--|----------|----------|-----------------|------------------|----------|-----------------|
| Variable   | <i>b</i> | 1-to-1   |                 | With Replacement |          |                 |
|  |          | SE       | Exp( <i>b</i> ) | <i>b</i>         | SE       | Exp( <i>b</i> ) |
| Child pornography offenders                                | 2.96     | .42      | 19.27***        | 3.58             | .28      | 35.79***        |
| Constant   | −3.41    | .41      | —***            | −2.66            | .28      | —***            |
| Sigma  |          | 4.14     |                 |                  | 3.25     |                 |
| Log likelihood   |          | −814.47  |                 |                  | −4815.15 |                 |
| <i>n</i>   |          | 672      |                 |                  | 2,869    |                 |
| Child Pornography <sup>a</sup> vs. All Other Matched Cases |          |          |                 |                  |          |                 |
| Variable   | <i>b</i> | 1-to-1   |                 | With Replacement |          |                 |
|  |          | SE       | Exp( <i>b</i> ) | <i>b</i>         | SE       | Exp( <i>b</i> ) |
| Child pornography offenders                                | 1.35     | .13      | 3.85***         | 1.61             | .13      | 4.99***         |
| Constant   | −.54     | .11      | —***            | −.71             | .12      | —***            |
| Sigma  |          | 3.29     |                 |                  | 3.30     |                 |
| Log likelihood   |          | −4975.72 |                 |                  | −6263.12 |                 |
| <i>n</i>   |          | 3,136    |                 |                  | 3,807    |                 |

<sup>a</sup> Production of child pornography cases were excluded from the analyses.

\*\*\*  $p < .001$ .



**Table 5. Tobit Decomposition for the Probability and Length of Judicial Departures in Matched Samples of Child Pornography and Sexual Abuse Offenders**

| <b>Downward Departure—Full Population</b> |                    |                  |
|---|--------------------|------------------|
|   | <b>Δ Prob</b>      | <b>Δ Length</b>  |
| Child pornography offenders               | <b>31.97%</b>      | <b>82.73%</b>    |
| 95% Confidence interval                   | [25.88% to 38.06%] | [64.92% to 100%] |
| <b>Downward Departure—Matched Sample</b>  |                    |                  |
|   | <b>Δ Prob</b>      | <b>Δ Length</b>  |
| Child pornography offenders               | <b>25.15%</b>      | <b>82.70%</b>    |
| 95% Confidence interval                   | [17.98% to 32.32%] | [58.99% to 100%] |

*Notes.* Significant effects ( $p < .05$ ) reported in bold. Full population downward departure  $n = 3,320$ ; matched sample downward departure  $n = 686$ .

**Table 6. Number of Judicial Written Reasons for Downward Departures By Offense Type  
(Per 1,000)**

| <b>Offense Type</b> | <b>Count</b> | <b>Population</b> | <b>Rate</b> |
|---------------------|--------------|-------------------|-------------|
| Child pornography   | 86           | 3,359             | 25.60       |
| Sexual abuse        | 11           | 792               | 13.89       |
| Violent             | 33           | 3,846             | 8.58        |
| Firearm             | 60           | 15,844            | 3.77        |
| Drug                | 173          | 50,856            | 3.40        |
| Fraud/white collar  | 150          | 24,043            | 6.24        |
| Property            | 14           | 3,543             | 3.95        |
| Other               | 57           | 9,261             | 6.15        |

*Note.* Immigration cases were excluded from the analyses.